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No. 91-962

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

CYNTHIA HARRIS,

Appellant,

v.

THE CITY OF BIRMINGHAM, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION OF APPELLEE CITY OF BIRMINGHAM TO AFFIRM OR DISMISS

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QUESTION PRESENTED

The question presented by this motion to affirm the judgment below or to dismiss the appeal is whether this Court should allow the parties-plaintiff/appellant to so pervert the provisions of § 5 of the Voting Rights Act as to subvert the remedial purposes of the Act, where:

a. The interests sought to be protected in the lawsuit were clearly not those of the nominally named individual plaintiff (and Nominal Appellant herein), but were rather the economic interests of the named official bodies of Greene County, Alabama, which entities operate and/or are monetary beneficiaries of an ongoing pari-mutuel dog racing track in that County, the plaintiffs below being convinced that the institution of a competing dog racing track in the City of Birmingham, located in Jefferson County, Alabama, would spell financial disaster for the Greene County track;

b. The record below is barren, both directly and inferentially, of any fact, suggestion, or glimmer of evidence that the election provisions governing the institution of dog racing in the City of Birmingham are, would or could conceivably be racially discriminatory or have the potential for such; and

c. In any event, the case has been rendered moot in that the interests for whom the Nominal Appellant is fronting sought below to enjoin an August 27, 1991, referendum election on whether pari-mutuel dog racing could be conducted in Birmingham; that election was held on that date and the majority of those voting voted "no."

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INTRODUCTION

This case is no more and no less than the cynical exploitation of the Voting Rights Act in furtherance of the purely economic goals of the true parties in interest. From the parties-plaintiff, to the objections raised, to the contrast between the object of the litigation and the known preferences of a majority of black voters, to the testimony of Cynthia Harris (sometimes referred to as the "Nominal Appellant"), the record in this case reflects only unabashed abuse of the Voting Rights Act. For that reason, it is manifest that the issues raised by the Nominal Appellant are so insubstantial as not to warrant further argument, and the decision below is due to be affirmed summarily.

BACKGROUND FACTS

By statutory enactments of some years ago, the Alabama legislature authorized the institution of dog racing and pari-mutuel wagering thereon in three Alabama counties: Greene (J. S. App. A-6), Mobile and Macon. Greene County is geographically closer to the City of Birmingham than is Mobile County or Macon County.

In 1984, the Alabama legislature enacted Act No. 84-131 (Code of Ala. §11-65-1 *et seq.*), authorizing pari-mutuel wagering on horse racing in Birmingham if approved by a majority of the voters in Birmingham, and by a majority of the voters of the counties in which Birmingham lay; at that time, only Jefferson County. The proposition won voter approval, and a horse racing track was thereafter built and operated. The horse track operation was a financial disaster.

Effective July 18, 1991, the Alabama legislature amended the horse racing act of 1984 with Act 91-187 so as to permit, on voter approval in the City of Birmingham and Jefferson County, pari-mutuel wagering on dog racing in Birmingham. At the time Act 91-187 was passed, a small portion of Shelby County — encompassing less than 100 registered voters —

had been annexed by the City of Birmingham. Act 91-187 did not require a vote of any citizen of Shelby County.

Section 5 preclearance of the dog racing act amendment to the horse racing act was not sought. (Nor had preclearance been sought for the 1984 horse racing act. No lawsuit resulted from that failure. Apparently the Greene County interests did not view horse racing as a threat to the profits of the dog track in Greene County.)

Plaintiffs[1] commenced this action on August 15, 1991, seeking to enjoin the August 27, 1991, referendum election among voters of Jefferson County to decide, as authorized by Alabama Act 91-187, whether dog racing and wagering thereon was to be had in Jefferson County, City of Birmingham. The alleged grounds of the action included the failure of the State of Alabama or concerned local governments to seek preclearance of Act 91-187 under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

ARGUMENT

The Voting Rights Act of 1965, as amended, was enacted by the Congress as a sorely needed remedial measure to ensure that black citizens could enjoy fully the freedom to vote and the rights and benefits attending that freedom in states and localities, largely in the United States South, where, historically and traditionally, those freedoms and rights were denied to blacks or otherwise abridged (J. S. App. A-3, n. 1, 2). "The Voting Rights Act was aimed at ... state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Board of Elections,* 393 U.S. 544, 565 (1969).[2] As detailed more fully below, this case does not implicate *any* of the concerns animating the Voting Rights Act.

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[1] As explained below, the Nominal Appellant was not one of the original plaintiffs in this action.

[2] The preamble to the Voting Rights Act of 1965 establishes that the central purpose of the Act is '[t]o enforce the fifteenth amendment to the

The original parties to this litigation were the Greene County Racing Commission, the Greene County Board of Education (a beneficiary of a portion of the proceeds from the Greene County Dog Racing Track), the Greene County Commission (the county governing body) (collectively, the "Greene County Interests"), and one Randy Gann, allegedly a registered voter of that minute portion of Birmingham lying in Shelby County, Alabama. As later events were to demonstrate, Gann was a hastily drafted and poorly selected pawn; the Greene County Interests were the true parties in interest.

The circumstances of original nominal plaintiff Randy Gann — the only plaintiff with any arguable standing to raise Voting Rights Acts claims — dictated the issues originally identified by counsel for the Greene County Interests. Pursuant to an Order of the trial court, the plaintiffs identified prior to the hearing the claims they intended to present to the Court. Those claims were: (1) by limiting voting to Birmingham residents who live in the Jefferson County portion of the City, Birmingham residents of the Shelby County portion of the City had been "deannexed"; (2) the holding of an election to consider dog racing and pari-mutuel betting was itself a change from practices and procedures as they existed on November 1, 1984; and (3) the scheduling of a special election was a change requiring preclearance.[3] (J. S. App. A-15).

Then, within 24 hours of the hearing, Randy Gann withdrew as a party plaintiff without explanation,[4] and an eleventh hour

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Constitution of the United States.' The Fifteenth Amendment provides: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' U.S. Const., Amdt. 15, § 1." *Chisom v. Roemer*, ___ U.S. ___, 111 S.Ct. 2354, 2357 (1991).

[3] The Nominal Appellant suggests in the Jurisdictional Statement, p. 6, that all issues ultimately raised were originally raised. That is not so.

[4] The evident explanation is provided by the absence of his name from the voting rolls of Shelby County. J. S. App. A-19, n. 12.

recruit, Nominal Appellant Cynthia Harris, emerged.[5] Unlike Gann, Harris was black and from Jefferson County, and the issues pressed by the Greene County Interests shifted as rapidly as had their nominal plaintiffs. The newly anointed nominal plaintiff brought to the hearing new, previously unannounced arguments concerning the timing of the election, in addition to firing a blunderbuss of other challenges to the referendum.

Nominal Appellant Cynthia Harris voiced two specific complaints from the witness stand: (1) the date on which the referendum was scheduled was inconvenient for her, Appellee App. A-3; and (2) she did not feel that she had been provided sufficient information upon which to make a decision, Appellee App. A-4. The Nominal Appellant also identified the relief she sought. She wanted the court to change the substance of the dog racing act to require that the government receive a greater portion of the proceeds, Appellee App. A-11, and she thought the track "should be for the people" rather than the designated licensee. Appellee App. A-12. Finally, the Nominal Appellant wanted "enough time to find out what's really going on as far as this dog track is concerned." Appellee App. A-13. Only her complaint as to the timing of the election arguably falls within the zone protected by the Voting Rights Act, and that grievance is undeniably illusory.[6]

The Nominal Appellant's sole pertinent objection to the setting of the referendum was that the referendum was on the same day that she was required to enroll two of her children in school. Because she had to enroll her two children in school,

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[5] Cynthia Harris clearly was a party in name only — she was no more than a front for the Greene County Interests. The direct examination of Harris by "her" attorney was designed to elicit only facts sufficient to satisfy the standing requirements. Appellee App. A-2.

[6] Ms. Harris made no claim that blacks were disapportionately denied information. Indeed, she made no claim that *she* had been denied information. Her testimony revealed that she had ignored widespread press accounts and that she was a victim only of her own apathy. Appellee App. A-5-7.

said the Nominal Appellant, she would be unable to vote in the election. Necessary to that argument is the implicit assertion that the Voting Rights Act was somehow implicated by her "inability" to vote.

The Nominal Appellant's own testimony, however, revealed that her personal difficulty, if any, was largely imagined and in any event, not demonstrated to have any effect on the ability of blacks to vote or the likelihood that blacks would vote. The polls were to be open between 7:00 a.m. and 7:00 p.m. The only identified obligation Ms. Harris had that day was to enroll two children in school between 7:30 and 8:00 a.m. Appellee App. A-8. For the remainder of the voting day, Ms. Harris, though *unemployed,* had an unspecified full calendar that would preclude her from voting. Appellee App. A-8. However, her full calendar has no bearing on the ability and opportunity of blacks generally to vote, either absolutely or vis-a-vis whites.

Equally irrelevant to the Act is the coincidence that the referendum fell on the date that Ms. Harris was to enroll two of her children in school. Ms. Harris was to enroll two children in Holy Family, a school — presumably a private school — in Birmingham. The record is wholly silent as to the racial composition of Holy Family or of the number or racial composition of other schools, if any, with registration that day. In short, there was and is *no* evidence — not even a scintilla — for a conclusion that the "plight" of the Nominal Appellant, if indeed one existed, was applicable to any other potential black voters. The absence of such evidence comes as no surprise, given that the interests sought to be advanced by this litigation are those of the various Greene County entities, not those of black voters.

What is ultimately most absurd, amidst a potpourri of absurdities, is that plaintiffs purported to represented the interest of black voters; after all, the Voting Rights Act is designed to prevent the dilution of black voting strength, not to serve as a tool to further business interests unrelated to the remedial purposes of that act. However, the only goal of the Greene

County Interests was to see dog racing in Jefferson County defeated through the injunction of the referendum. In marked contrast, the great majority of the black community *supported* dog racing in Birmingham. In those voting precincts in which a majority of the registered voters are black, a clear majority of voters were in favor of authorizing dog racing. Aff. of Nell Hunter.[7] In fact, the 41 precincts where 90% or more of the registered voters are black voted for dog racing at percentages ranging from 78.8% to 94.4%. Aff. of Nell Hunter.

Examination of the decisional law applicable to those claims of the Nominal Appellant arguably bearing on the Voting Rights Act clearly establishes that the disposition of the court below was correct. The three judge panel did not attempt to discern or evaluate the actual purpose or effect of the alleged changes in voting procedure. Rather, the court directed its attention to the *potential*, if any, for discrimination under the Alabama dog racing statute, as prescribed by the decisions of this Court. *Dougherty Cty, Ga. Bd. of Ed. v. White*, 439 U.S. 32, 42 (1978) (per Marshall) ("Thus, in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination") (emphasis in original); *NAACP v. Hampton Co. Election Com'n*, 470 U.S. 166, 181 (1985) ("Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination") (emphasis in original); *Georgia v. U.S.*, 411 U.S. 526, 534 (1973) ("The question, rather, is whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5"); *Perkins v. Matthews*, 400 U.S. 379, 388-389

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[7] The hearing in the court below was held prior to the election. This Appellee has been informed by the chief deputy clerk of this Court that Appellee appropriately may include the election results in an Appendix to this Motion. The official election results are an attachment to the Affidavit of Nell Hunter. The affidavit and its attachment collectively appear at pp. A-14-A-63 to the Appendix filed herewith.

(1971) ("Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting").

The three judge panel's dismissal of the voting rights claims was amply supported by the undisputed evidence of record:

1. *The exclusion of Shelby County voters.*[8] The hasty withdrawal of Randy Gann as a plaintiff purportedly representing voters of Shelby County notwithstanding, the Nominal Appellant persists in asserting that the statute worked a Voting Rights violation in that only voters residing in Jefferson County (the county in which dog racing would be had) were to vote in the referendum. Putting aside the obvious reasonableness of this provision, it is impossible to conclude that the exclusion of Shelby County voters, 92.4% of whom are white, bears on any interest protected by the Voting Rights Act. More strange is the asserted interest in the claimed voting rights of the voters in that small part of Shelby County annexed to Birmingham, where 98.78% (81 out of 82) registered voters are white (J. S. App. A-19). On these facts, the three judge panel reached the only plausible conclusion: exclusion of the overwhelmingly white Shelby County voters posed no conceivable potential for minority voter discrimination. To the contrary, inclusion of a group of voters, over 90% of whom are white, would have the effect of diluting the votes of blacks in Jefferson County and Birmingham, both of which have substantially larger proportions of black voters.

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[8] Though the record is not fully developed on the issue, the exclusion of Shelby County voters does not constitute a change in voting procedures. As the court below recognized, *inclusion* of Shelby County voters would itself have been a change requiring preclearance. Historically, and quite logically, the franchise in referenda has been limited to registered voters residing within the affected jurisdiction — here, Jefferson County. For example, every referendum on dog racing has been limited to the county in which dog racing was to occur. Plaintiffs below certainly cited no pre-1964 voting procedures that differed from that followed in this case to limit the vote to the affected county.

2. *The setting of the election date.* The dog racing act required the Birmingham City Council to set the date of the referendum election on dog racing. That act proscribed holding the election at the time of a mayoral election or in an election in which two or more seats on the Council were to be filled. The record is barren of any evidence or inference that this provision would in any manner adversely impact black voters. The Mayor of Birmingham, a black whose political savvy is evidenced by his lengthy tenure in office, testified that it would not. Like the black community at large, the Mayor supported dog racing and passage of the referendum. Because the black community heavily favored dog racing, a large black turnout was in the Mayor's interest. Yet the Mayor supported the proscriptions challenged by the Nominal Appellant. Moreover, the date set for the referendum was set by the Birmingham City Council — comprised of six black members and three white members (J. S. App. A-22, 23) — upon the recommendation of the Mayor.[9] The Mayor testified that he would have set the referendum on the date it was set (a date for which county-wide elections were already scheduled) even had the date of the Mayoral election not been proscribed. (J. S. App. A-22, 23).

In sum, the voting rights allegations in this case are a farce, a hastily constructed facade poorly concealing the purely economic interests motivating this lawsuit. Nonetheless, the three judge panel accorded plaintiffs a full hearing and a thoughtful memorandum of opinion rejecting their claims. The City of Birmingham submits that this Court cannot and should not be so generous with its limited and valuable time. The Court should summarily affirm the unanimous judgment of the three judge panel below.

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[9] In dog racing referenda held in other counties, the date uniformly was set by the County Commission. Here, the predominately black City Council, rather than the predominately white County Commission, was designated by the Legislature as responsible for setting the date.

In any event, the controversy under the Voting Rights Act, if ever extant, is now moot. For the economic reasons above stated, the Greene County official bodies sought in their complaint to enjoin the holding of the August 27, 1991 election. Following upon the court below's dismissal of all Voting Rights claims, the election was held and the predominately white opponents of dog racing in Birmingham prevailed, the "yes" votes of the overwhelming number of voting blacks notwithstanding. Aff. of Nell Hunter. Under the terms of Act 91-187 if, as happened here, the dog racing proposition was defeated by the voters, the City of Birmingham may call another election. Such subsequent election may be held 45-90 days following the date of the City Council action calling the election. Not more than one such election may be held in any one calendar year (Code of Ala. 11-64-4(b) and (d) as set forth at J. S. App. A-32, 36-7).

Appellant, if and in the event another dog racing election is called by the City Council of Birmingham, is free to seek to enjoin any such election or, if held, to seek a declaration voiding or nullifying the election results. In brief, the instant case has been mooted by events. The opportunity for this appellant or others to assert the invalidity of any election called in the future is clearly not foreclosed.

CONCLUSION

For the within stated reasons, the Court should dismiss this appeal or, alternatively, summarily affirm the judgment of the three judge court.

Respectfully submitted,

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